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Supreme Court, U.S.
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NO. 89-519

In the Supreme Court of the United States

OCTOBER TERM, 1989

DEBRA BURR, wife of/and WILLIE BURR
Petitioners

VERSUS

HUTHNANCE DRILLING COMPANY
AND THE D/V VANGUARD II
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner presents two questions for review. Question 1 pertains to petitioner's entitlement to maintenance and cure benefits where the trial and appellate courts determined that the medical evidence established that there was no objective finding of injury which would prevent petitioner from returning to work in the oilfield eight months after his alleged accident and petitioner relied solely on the testimony of a physician who evaluated the plaintiff over ten months after the alleged incident upon referral from his attorney and after numerous physicians who treated petitioner could find no evidence of injury. This question does not involve any conflict of the Circuits or other compelling question of law for resolution and merely seeks further appellate review of the decisions of the two lower courts whose decisions to deny maintenance and cure benefits were premised on petitioner's credibility, which was determined by the trial court to be "poor".

Question 2 seeks a determination of whether petitioner is entitled to compensatory and punitive damages for defendants' refusal to pay maintenance and cure benefits.

Respondents submit that neither question is appropriate for review by Writ of Certiorari as neither question falls within the perameters set forth in Rule 17.1 of the rules of the Supreme Court.

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STATEMENT OF THE CASE

Petitioners, Willie Burr and his wife, Debra McClannahan Burr, filed suit for damages allegedly arising out of an incident which occurred on August 4, 1986 while Willie Burr was employed by Huthnance Drilling Company. Mr. Burr was pulling drill slips on the rig floor of the D/V VANGUARD II with Ronnie McGowen when he felt a sharp pain. He continued to work on the drill floor with his co-worker for approximately one hour following the incident and completed his tour. Some time following the alleged incident, Mr. Burr advised McGowen in a laughing manner that he had injured himself, but did not mention any complaints of back pain. He also later indicated to a coworker, Emmett Smallwood, that he injured his groin. The Huthnance Supervisor's Report of Accident Investigation signed by Mr. Burr records Mr. Burr's injury as " pain in lower groin area". Mr. Burr did not request any medical assistance aboard the drilling rig nor did he ask to be transported to shore prior to his regularly scheduled crew change.

Willie Burr was initially evaluated by Dr. Garland Miller, a general practitioner in Zwolle, Louisiana, who had formerly treated Burr's son. A CT scan performed at the request of Dr. Miller was interpreted as normal. Dr. Miller was Mr. Burr's choice of physician.

Huthnance was notified that Mr. Burr had seen a physician in his hometown of Many, Louisiana after completing his hitch and immediately began paying maintenance and cure benefits.

Dr. Miller referred Mr. Burr to Dr. J. E. Smith, an orthopedist in Shreveport, Louisiana. Dr. Smith treated him from August 20, 1986 through February 9, 1987, con-

cluding that Mr. Burr had no objective evidence of a disc injury and could return to work in the oilfield. Mr. Burr was also referred by his attorney to Dr. Larry Broadwell, a rheumatologist, who was of the opinion that Burr had some sort of emotional problems, whether conscious or subconscious. From an objective standpoint, Dr. Broadwell found nothing that would prevent Willie Burr from returning to work as a roustabout in the oilfield on February 23, 1987.

From August 19, 1986 to February 5, 1987, Willie Burr attended sixty-two physical therapy sessions under the supervision of Mary Miller. During those visits, Burr complained of various types of pain on an irregular and infrequent basis. He did not complain of pain in his lower back until December 2, 1986. Prior to that time, during the sessions where he did complain of pain, it was limited to his upper back or leg.

Maintenance and cure benefits continued until April of 1987 when Huthnance was advised by Dr. Phillip Osborne, the supervising physician, of an eleven day in-patient program at the Physicians and Surgeons Hospital Pain Unit in Shreveport, Louisiana, that Willie Burr had reached maximum medical cure and could return to work in the oilfield as a roustabout. Mr. Burr was admitted to the P & S Pain Unit as a result of a referral from Dr. Miller, the physician initially selected by Mr. Burr. Dr. Osborne is a specialist in evaluating and treating chronic pain and rehabilitation problems and was Mr. Burr's primary physician during his eleven day stay at the facility. During the course of his eleven day in-patient admission, Willie Burr underwent a complete battery of tests, including an MRI, all of which were interpreted as negative. He participated in work hardening and work fitness programs under a physician's supervision. He was also evaluated by a

neurosurgeon and released from the hospital pain-free. Dr. Osborne calculated that the combined accuracy rate of all of the tests performed on Mr. Burr was ninety-nine percent. After being given every benefit of the doubt, Dr. Osborne released Burr to return to work in the oilfield as of April 10, 1987. Dr. Osborne's opinion was based on the lack of objective evidence of a back injury.

In June of 1987, Mr. Burr was referred by his attorney to Dr. Stuart Phillips, an orthopedist in New Orleans, Louisiana. Dr. Phillips initially evaluated Mr. Burr on June 23, 1987, more than ten months following the alleged injury. During his initial evaluation, Dr. Phillips diagnosed an internal disc disruption after reviewing selected medical records which were forwarded by Burr's attorney and without conducting any diagnostic tests. On July 23, 1987, Mr. Burr returned to Dr. Phillips "on an emergency basis" with an exacerbation of his problems. It was not until after Burr returned with an exacerbation of his complaints that any diagnostic tests were performed at Dr. Phillips' request. Dr. Phillips made the controversial diagnosis of "internal disc derangement" without the benefit of Burr's past medical records which revealed that other physicians and a physical therapist felt that Burr was malingering and without knowledge that he had been released "pain-free" from a pain clinic three months prior to seeing him. Additionally, Dr. Phillips felt it important to know that Mr. Burr completed a work hardening program in which he worked with thirty to forty pound weights.

After receiving reports of Dr. Phillips' diagnosis, defendants immediately submitted all of Dr. Phillips' records and reports to Dr. Osborne for review. Dr. Osborne re-evaluated Willie Burr on September 1, 1987 indicating that "you wouldn't recognize the patient". Dr. Osborne issued a report on September 25, 1987 reiterating his

earlier opinion that Willie Burr was fit to return to work in the oilfield on April 10, 1987 and did not have a disc problem at that time. After consultations with a neurosurgeon and an orthopedic surgeon, Dr. Osborne was confident that Burr could not have participated in the work hardening program if he had the condition diagnosed by Dr. Phillips.

Willie Burr was also referred by counsel for Huthnance to Dr. James C. McDaniel, an orthopedic surgeon in Lafayette, Louisiana, for evaluation. Dr. McDaniel concluded that Willie Burr had no orthopedic or neurologic injury and felt that Burr was a malingerer and was not experiencing *any* pain. Huthnance did not reinstate maintenance and cure benefits to Willie Burr based on the opinions of Drs. Osborne and McDaniel.

Willie Burr ultimately underwent an anterior lumbar fusion on January 11, 1988 performed by Dr. Phillips. Dr. Phillips extracted degenerated disc material during the surgery from the L5-S1 level. However, Dr. Phillips admitted that what he found when he performed surgery either could or could not cause pain. Dr. McDaniel testified at trial that the degenerative disc that Dr. Phillips found during surgery is found in a high percentage of people thirty years of age.

Prior to the surgery, and at the request of Dr. Phillips, Dr. Lane Salzar, a clinical psychologist, evaluated Willie Burr and concluded that he displayed both hyperchondriacal and hysterical personality features and he appeared to be experiencing "psychological factors which effected his physical condition".

Petitioners originally brought an action adverse to Huthnance Drilling Company and the D/V VANGUARD II alleging negligence under the Jones Act, unsea-

worthiness and entitlement to maintenance and cure benefits under the General Maritime Law. Petitioners later amended their Complaint to include a claim for punitive and compensatory damages for the defendants' refusal to pay maintenance and cure benefits. Thereafter, petitioners filed a Motion to Sever the maintenance and cure claim and to set the matter for an expedited bench trial. The trial court granted the Motion to Sever and the claim was set for hearing on September 6, 1988.

On September 6, 1988, petitioner's maintenance and cure claim was tried before the Honorable John M. Duhe. Plaintiff submitted the deposition testimony of Dr. Charles Aprill and Dr. Stuart Phillips in support of its assertion that the condition diagnosed by Dr. Phillips and which ultimately necessitated surgery was causally related to the incident on August 4, 1986 aboard the D/V VANGUARD II. The defendant submitted the depositions of Dr. James C. McDaniel, Dr. Larry K. Broadwell, Dr. Phillip Osborne, Dr. Warren Founds, Dr. J. E. Smith, Dr. Warren D. Long, Jr., Dr. Donald E. Wolfe, and Mary Margaret Miller, physical therapist, to establish that the condition which caused Willie Burr back pain subsequent to April 10, 1987 was not caused by the August 4, 1986 incident while in the employ of Huthnance.

After taking the matter under advisement, Judge Duhe issued Findings of Fact and Conclusions of Law finding that Willie Burr had reached maximum medical cure on April 10, 1987 and had failed to prove by a preponderance of the evidence that any condition or injury which may have resulted in back pain following April 19, 1987 was causally related to any injury or condition which manifested itself while plaintiff was in the employ of Huthnance Drilling Company. The trial court specifically found that Dr. Phillips could not state that what he

reported as a degenerative disc was caused by the alleged incident aboard the D/V VANGUARD II. The trial court further found that Dr. Phillips' diagnosis and treatment was based primarily on the accuracy of the history related to him by Mr. Burr and Mr. Burr's complaints. Respondents place great emphasis on the finding of the trial court that petitioner's credibility is poor, citing numerous discrepancies and inconsistencies in the complaints voiced during his treatment and the opinions of the physical therapist and orthopedist that plaintiff was a malingerer.

A judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure was entered by the court upon motion of respondents and petitioners perfected a timely appeal to the United States Fifth Circuit Court of Appeals. The Fifth Circuit entered a *per curium* opinion dated June 9, 1989 affirming the decision of the lower court. In support of its decision, the Fifth Circit referred to the substantial medical evidence which indicated that there was no objective finding of a back injury as of April 10, 1987, the determination that Dr. Phillips' opinion was based primarily on Willie Burr's statements and the district court's finding that Willie Burr was not credible, thus discounting the statements upon which Dr. Phillips relied. On July 5, 1989, the Fifth Circuit Court of Appeals denied plaintiff's suggestion for panel rehearing and rehearing *en banc.*

SUMMARY OF THE ARGUMENT

Respondents respectfully submit that this matter does not involve a decision which is contrary to decisions of the Court of Appeals of other circuits, does not involve a departure from the accepted and usual course of judicial proceedings, nor does it involve an important question of federal law which has not been decided by the Supreme

Court such that this court should exercise its discretionary power of review. The district court's Findings of Fact and Conclusions of Law and the subsequent approval of that decision by the Fifth Circuit Court of Appeals was based on the district court's weighing the entirety of the medical evidence with regard to the treatment of petitioner, the credibility of petitioner and the appropriate legal standards with respect to the issues of petitioner's entitlement to maintenance and cure. Respondents respectfully submit that petitioner is seeking, through the Petition, to have the Supreme Court grant a Writ of Certiorari to review the evidence of the case and discuss the specific facts of petitioner's entitlement to maintenance and cure benefits, which is not within the perameters of certiorari review. This matter does not involve "principles the settlement of which is of importance to the public", but rather involve issues of fact the resolution of which are of interest only to the parties involved. See *Rice v. Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955).

ARGUMENT

I. THE LOWER COURTS DID NOT ERR IN DENYING PETITIONER'S CLAIM FOR MAINTENANCE AND CURE BENEFITS SUBSEQUENT TO APRIL, 19, 1987 WHERE, PRIOR TO THAT TIME, A NUMBER OF MEDICAL SPECIALISTS FOUND NO EVIDENCE OF INJURY AND THE EVIDENCE IN SUPPORT OF THE CLAIM FOR MAINTENANCE AND CURE WAS THE SINGLE CONTRARY OPINION FROM A PHYSICIAN WHOSE DIAGNOSIS AND TESTIMONY WITH RESPECT TO CAUSATION WAS BASED ON THE PLAINTIFF'S STATEMENTS, AND PLAINTIFF'S CREDIBILITY WAS FOUND TO BE UNTRUSTWORTHY.

Respondents submit that there is an insufficient basis for the Supreme Court to exercise its discretion to grant certiorari to review the instant case. Rule 17.1 of the Supreme Court rules provides an illustrative list of considerations which govern the review on a Petition of Certiorari. Petitioner has not asserted that the Fifth Circuit Court of Appeals decision is in conflict with the decision of another Federal Court of Appeals nor has there been any assertion that the lower court decisions have "so far departed from the accepted and usual course of judicial proceedings" so as to warrant review by this court. Supreme Court Rule 17.1(a). Petitioner has also failed to assert that the Fifth Circuit Court of Appeals has decided an important question which has not been settled by the United States Supreme Court. Supreme Court Rule 17.1(c). The issues raised by petitioner turns on the facts of the case and the conclusions of law reached by the respective lower courts and are of interest only to the parties involved, as opposed to the public. Petitioner is asking the Supreme Court to set aside the Findings of Fact of the lower courts or reverse the decisions due to an error of law. This basis for seeking review to the Supreme Court is insufficient for the exercise of this Court's discretion in granting certiorari herein.

The Supreme Court has consistently held that it will not grant a Writ of Certiorari to review evidence and discuss the facts of a specific case. *U. S. v. Johnston*, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925). Additionally, the Supreme Court traditionally accords great weight to a fact-finding which has been made by a district court and approved by a court of appeals. *National Collegiate Athletic Association v. Board of Regents of The University of Oklahoma*, 104 S.Ct. 2948, 82 L.Ed.2d 70, 468 U.S. 85 (1986). Willie Burr is asking the Supreme Court to review the decisions of two lower courts whose findings were made

after weighing the entirety of the evidence and determining that Burr failed to prove his entitlement to maintenance and cure benefits beyond the date his employer ceased payments. In support of his Petition, plaintiff cites the testimony of a physician who examined the plaintiff over ten months after the date of the alleged accident and whose diagnosis and opinion with respect to surgery was based to a large extent on the history provided by Burr. The district court assessed the credibility of Willie Burr and found it to be "poor".

Respondents dispute the fact that Dr. Phillips was plaintiff's treating physician and suggest that this physician was called upon by petitioner's attorney to "treat" Burr only after all other experts had found no evidence of injury. Mr. Burr was treated by numerous physicians, including an orthopedist, neurosurgeon, rheumatologist, general practitioner and ergonomics expert prior to being referred by his attorney to Dr. Phillips. Respondents did *not* refer Burr to any of these physicians or to the P & S Clinic and any inference by the petitioners to the fact that the defendants hired physicians to testify in their favor is grossly misleading.

The lower courts in this case chose to accept the substantial medical evidence establishing the lack of injury and that Willie Burr was capable of returning to work in the oilfield as of April 10, 1987 over that of a physician who petitioner saw at the requests of his attorney over ten months after the date of the alleged incident and who relied on the veracity of the petitioner in rendering his opinion. These issues, and particularly the issue of causation, are treated as fact questions in admiralty cases. *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988). Consequently, this matter does not involve an important question of law for the court's consideration.

This case does not involve the situation where the employer sent a seaman to a physician for an independent medical examination and the court chose to accept that physician's opinion over the seaman's treating physician. Quite the contrary, this case involves the plaintiff attorney's referral of the seaman to a physician after all other "treating" physicians who were either chosen by the seaman or who were treating him on referral from his hometown physician could find no objective evidence of injury.

These findings do not represent a departure from the principles of the maintenance and cure remedy and do not raise important considerations from the standpoint of future cases so as to warrant this court exercising its supervisory power to review those Findings of Fact and Conclusions of Law. Respondents would request that the Petition for Writ of Certiorari be denied.

As respects the merits of the Petition, petitioner would have the Supreme Court hold that whenever there is conflicting medical testimony, the court must accept the testimony of the physician who evaluates the seaman at the requests of his attorney, diagnoses a "condition" and relates it to the incident based on the history given by the seaman irrespective of what prior physicians have found and their opinions. If petitioner's assertions were accepted, the trial court would not be entitled to assess the basis of the physicians' opinions, weigh the conflicting evidence and make a credibility judgment to determine that, even resolving all doubts and ambiguities in favor of the allegedly injured seaman, the weight of the evidence establishes that plaintiff reached maximum medical cure. Such a holding would allow the plaintiff to "doctor shop" until he has found one physician to testify that, based on what the seaman has told him, he diagnoses a "condition" which

necessitates surgery and which is related by history to a particular incident. The seaman would recover maintenance and cure benefits under this scenario irrespective of whether the history given to the physician is accurate or trustworthy and regardless of how many doctors who treated the individual immediately following the incident say otherwise. Respondents respectfully submit that the General Maritime Law, although construed favorably with regard to an injured seaman, does not afford the seaman such relief.

In response to petitioner's assertion that Dr. Phillips' testimony alone supports a claim for maintenance and cure benefits, as a matter of law, the United States Fifth Circuit Court of Appeals properly cited the case of *Morales v. Garijak, Inc.*, 929 F.2d 1355, 1359 (5th Cir. 1987), and distinguished that case from the present one on the basis that the testifying physicians' testimony in *Morales* was uncontroverted. The Fifth Circuit pointed out that in the present case, "a number of specialists found no injury and the single contrary opinion was based on untrustworthy medical history". This is clearly the proper analysis with regard to a claim for maintenance and cure benefits where the medical evidence is seriously in dispute. Further review by this court of the standard applied in this maintenance and cure case is therefore unwarranted.

The physicians who saw Burr at his or his hometown physicians' request could find no objective evidence of injury which would prevent Willie Burr from returning to work in the oilfield as a roustabout. The testimony presented at trial further established that this determination was made only after resolving all ambiguities or doubts in favor of Mr. Burr. The trial court found that Willie Burr's credibility was "poor". There were a significant number of inconsistencies in the location and nature

of his complaints throughout the course of his treatment and the physical therapists and orthopedist advised that he was malingering. He was also diagnosed as having a "psychogenic pain disorder". Lastly, the finding by Dr. Phillips during surgery was, by his own admission, one that may or may not have caused pain and according to Dr. McDaniel is commonly found in a high percentage of people who are thirty years of age or older. Thus, petitioner's assertion that Dr. Phillips confirmed a disc injury during surgery is not accurate. The trial court *did not* make a finding that petitioner suffered from a "condition" which necessitated surgery. The court only found that "*any* back injury or condition which resulted in back pain to plaintiff following April 19, 1987 were not causally related to any injury or condition which manifested itself while plaintiff was in the employ of Huthnance", without finding that there actually was any such condition. Thus, it remains disputed that petitioner suffered from "a verified orthopedic injury" as asserted in the Petition.

Considering the substantial medical evidence, including an eleven day in-patient stay at the P & S Pain Clinic in Shreveport, Louisiana, wherein plaintiff underwent diagnostic tests, work fitness and work hardening program, the district court was afforded substantial support for its finding that "any back injury or condition which resulted in back pain to plaintiff following April 19, 1987 were not causally related to any injury or condition which manifested itself while plaintiff was in the employ of Huthnance". (See Conclusion of Law No. 8, Appendix D of petitioners' brief.) Without more than a mere assertion by petitoner that the trial court and Fifth Circuit Court of Appeals were incorrect in finding that plaintiff was not entitled to maintenance and cure benefits beyond April 19, 1987, this issue does not warrant further consideration by this court.

Petitioners request that the Supreme Court review the evidence in this case to determine whether plaintiff is entitled to compensatory and punitive damages for defendant's refusal to pay maintenance and cure benefits also lacks the necessary requirements for review by this court. However, out of an abundance of caution, respondents suggest that it is difficult to understand how petitioners can continue to maintain an action for punitive and compensatory damages for failure to pay maintenance and cure in light of the trial court and appellate court's finding that respondents were correct in refusing to pay maintenance and cure benefits beyond the date that they were terminated based upon the opinion of plaintiff's treating physicians. Respondents diligently investigated petitioner's claim for maintenance and cure after receiving Dr. Phillips' diagnosis and again after surgery was performed and did not act in an arbitrary and capricious manner when benefits were not reinstated.

CONCLUSION

The questions presented by petitioners for review are not sufficient to compel the Supreme Court to exercise its discretion in granting certiorari to review the decisions of lower courts. Petitioner is requesting that this Honorable Court review the evidence presented to the trial court, and in particular the testimony of Dr. Stuart Phillips, to decide whether the lower courts were correct in finding that plaintiff failed to bear his burden of proving that his injury, if any, occurred, was aggravated, or manifested itself while in the service of the D/V VANGUARD II. The issues in this matter with regard to causation turn entirely on the facts as presented by the evidence in the case and the credibility of the respective witnesses and do not raise any issue of

substantial importance which has not been decided by the Fifth Circuit nor does it present an important issue of federal law which should be settled by the Supreme Court. As noted by the Fifth Circuit Court of Appeals, the trial court's decision is amply supported by the evidence and was well reasoned. For these reasons, respondents respectfully submit that the Petiton for Writ of Certiorari should be denied.

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CERTIFICATE

I HEREBY CERTIFY that the above and foregoing document has this date been forwarded to all known counsel of record by placing a copy of same in the United States mail, properly addressed and postage prepaid.

Lafayette, Louisiana, this 20th day of October, 1989.

_____

EDWIN G. PREIS, JR.